

BEFORE THE FEDERAL ELECTION COMMISSION

2004 DEC -7 P 1:04

SENSITIVE

In the Matter of)

America Coming Together and Carl Pope, as Treasurer,)
The Media Fund)

DNC Services Corp/Democratic National Committee)

and Andrew Tobias, as Treasurer; and)

John Kerry for President, Inc.)

and Robert Farmer, as Treasurer, et al.)

MURs 5403, 5427, 5440, and 5466

GENERAL COUNSEL'S REPORT #4

I. ACTIONS RECOMMENDED

1. Find reason to believe that The Media Fund violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer.

2. Find reason to believe that the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to report, excessive in-kind contributions from The Media Fund.

3. Take no action at this time with respect to whether the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to report, excessive in-kind contributions from America Coming Together, or whether America Coming Together violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer.

4. Take no action at this time with respect to whether the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to report, excessive in-kind contributions from the New Democrat Network, or whether the New Democrat Network violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer.

5. Take no action at this time with regard to John Kerry for President Inc. and Robert Farmer, as Treasurer.

6. Find no reason to believe that America Votes, Moving America Forward, and Voices for Working Families violated 2 U.S.C. § 441a(f) by making excessive in-kind

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contributions, in the form of coordinated expenditures, to John Kerry for President, Inc. or the DNC Services Corporation/Democratic National Committee.

1 **II. INTRODUCTION**

2 This Report supplements the coordination analysis in General Counsel's Report #2
3 ("GCR #2") and analyzes the November 8, 2004 response of DNC Services Corporation/
4 Democratic National Committee and Andrew Tobias, as Treasurer (collectively, the "DNC") to
5 the complaint in MUR 5440 (the "DNC Response"). On September 29, 2004, the Commission
6 found reason to believe that certain respondents (America Coming Together and Carl Pope, as
7 Treasurer (collectively, "ACT"); and The Media Fund ("TMF")) made excessive contributions,
8 in the form of coordinated expenditures, to John Kerry for President, Inc. ("Kerry for
9 President").¹ See GCR #2. The Commission did not vote on two recommendations
10 (Recommendations 3 and 4) in GCR #2, which addressed allegations as to whether six other
11 organizations had made excessive contributions to Kerry for President in the form of coordinated
12 expenditures and whether Kerry for President had knowingly accepted excessive in-kind
13 contributions from ACT, TMF or the other six organizations. Following discussion regarding
14 these entities and the allegations in the MUR 5440 Complaint relating to the involvement of
15 various DNC officials with certain of these outside groups, the Commission deferred action on
16 these recommendations to allow time for the DNC to be notified of the Complaint and to respond
17 to the allegations.

18 Upon review of these allegations, the DNC Response, and information on the public
19 record, this Office recommends that the Commission find reason to believe that that TMF

¹ Earlier, on September 14, 2004, the Commission made certain findings in response to the First General Counsel's Report in these matters. These findings related to certain respondents' status as "political committees" and the alleged failure of certain respondents to allocate and report properly their activity.

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1 violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in
2 the form of coordinated expenditures, to the DNC.² Further, this Office recommends that the
3 Commission find reason to believe that the DNC violated 2 U.S.C. §§ 441a(f) and 434 by
4 accepting, and failing to report, excessive in-kind contributions from TMF. For reasons set forth
5 below, this Office recommends that the Commission take no action as to Kerry for President at
6 this time. Furthermore, we recommend that the Commission take no action at this time with
7 respect to the allegation that ACT and NDN violated 2 U.S.C. §§ 441a and 434 by making, and
8 failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC.
9 Finally, we recommend that the Commission find no reason to believe that America Votes,
10 Moving America Forward, and Voices for Working Families violated 2 U.S.C. § 441a(f) by
11 making excessive in-kind contributions, in the form of coordinated expenditures, to John Kerry
12 for President, Inc. or the DNC.

13 **III. ANALYSIS OF THE DNC**

14 The Complaint alleges that various respondents made expenditures for coordinated
15 communications.³ See 11 C.F.R. § 109.21. A communication is coordinated with a candidate,
16 an authorized committee, a political party committee, or agent thereof if it meets a three-part test:
17 (1) payment by a third party; (2) satisfaction of one of four "content" standards;⁴ and (3)

² The Commission already found reason to believe that ACT and TMF violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to John Kerry for President, Inc. See MURs 5403, et al. Certification (Sept. 29, 2004).

³ The Complaint also generally alleges that certain Respondents made coordinated expenditures for purposes other than communications. An expenditure that is coordinated with a candidate or party committee constitutes an in-kind contribution. See 2 U.S.C. § 441a(a)(7)(B); 11 C.F.R. § 109.20(a) and (b).

⁴ In *Shays v. FEC*, 02-CV-1984, slip op. at 32-48, 156-57 (D.D.C. Sept. 18, 2004) (notice of appeal filed Sept. 28, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court's opinion. In a subsequent ruling, the Court explained that the "deficient rules technically remain 'on the books,'" and did not enjoin enforcement of this

1 satisfaction of one of six "conduct" standards. 11 C.F.R. § 109.21. The conduct standards
2 include:

- 3 (1) communications made at the "request or suggestion" of the relevant candidate or
4 committee;
- 5 (2) communications made with the "material involvement" of the relevant candidate or
6 committee;
- 7 (3) communications made after "substantial discussion" with the relevant candidate or
8 committee;
- 9 (4) specific actions of a "common vendor";
- 10 (5) specific actions of a "former employee"; and
- 11 (6) specific actions relating to the dissemination of campaign material.

12
13 11 C.F.R. §§ 109.21(d)(1)-(6). The entity (candidate, authorized committee, or party committee)
14 with whom or which a communication is coordinated does not accept an in-kind contribution that
15 results from the "common vendor" or "former employee" conduct standards unless the entity, or
16 an agent thereof, is ultimately found to have engaged in conduct described by conduct standards
17 (1) through (3). 11 C.F.R. § 109.21(b)(2).

18 The Complaint alleges that specific individuals with roles in certain respondent
19 organizations also had ties to the DNC and/or Kerry for President that might satisfy the
20 "conduct" standard of the coordinated communication test. The DNC argues that the Complaint
21 does not state any violation by the DNC of the Act or the Commission's regulations.⁵ The DNC

(or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, slip op. at 2 (D.D.C. Oct. 19, 2004).

⁵ The DNC also makes two procedural arguments. First, it contends that the DNC is not a proper respondent because it was not specifically named as such by the complainant. DNC Resp. at 2-3. Second, the DNC argues that the delay between the filing of the Complaint and the date on which it received notice "may well have prejudiced the DNC's ability to defend itself in this matter." DNC Resp. at 3. Neither of these arguments withstands scrutiny. As to the former argument, respondent status does not depend on a party's presence in the caption of a complaint. Instead, as is the case here, the presence of sufficiently specific allegations in a complaint (even upon reconsideration) that a party has violated the Act triggers the respondent's rights of notice and an opportunity to respond. See 2 U.S.C. § 437g(a)(1). As to the latter argument, in the absence of bad faith or prejudice, the alleged untimeliness of a complaint notice does not bar the Commission from proceeding against that respondent. See, e.g., *FEC v. Franklin*, 718 F. Supp. 1272, 1277 (E.D. Va. 1989), *affirmed in part, vacated in part on other grounds*, 902 F.2d 3 (1989) (no suggestion of bad faith on the part of the Commission); *FEC v. National Rifle Ass'n*, 553 F. Supp. 1331, 1345 (D.D.C. 1983) (even where Commission inadequately performed or omitted notice or conciliation

assumes "for the sake of argument that the 'content' standard has been met," and generally argues that the Complaint does not state "any facts that could show that the 'conduct' standard has been met." DNC Resp. at 5.

A. Harold Ickes

The Complaint alleges that TMF has coordinated with the Democratic Party and the Kerry campaign as a result of the activities of Harold Ickes. Complaint at 29, 56, and 59. Harold Ickes, the founder and President of TMF, is a member of the DNC's Executive Committee. *Id.* at 59. The Complaint states that "[i]t defies credibility that the plans [Ickes] is now executing with soft dollars from the Media Fund were not discussed as a 'need' or a 'project' by the DNC's executive committee during this election cycle, or that he is not 'using' information he learned from his DNC position as part of his soft money Section 527 political activities." *Id.* By virtue of his DNC position, Ickes allegedly knew that Kerry would need financial assistance after the primaries, knew in which broadcasting markets the assistance would be needed, and has used that knowledge in carrying out TMF's communications and activities. *See id.* at 54-56.

The DNC's response is based on the argument that Ickes was not an "agent" of the DNC. *See* DNC Resp. at 5-6. Section 109.3 provides that, for purposes of the coordination regulations, an "agent" is a "person who has actual authority, either express or implied, to engage in" certain activities related to the making of communications. 11 C.F.R. § 109.3. The DNC argues that Ickes's mere membership (along with 60 others) on the DNC Executive Committee does not

obligations, such error may be excused where the act or omission was not intentional and where it caused no prejudice); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 66 n.16 (1984) (in absence of proof of bad faith on the part of EEOC, agency's failure to notify employer of discrimination charge within statutory time limit does not bar a subsequent suit). The DNC does not describe how it suffered any prejudice or suggest that the Commission has acted in bad faith.

1 provide him with the "authority to do anything relating to paid communications by the DNC"⁶ or
2 make him an "agent" of the DNC under the regulations, and therefore his activity does not
3 satisfy the "conduct" standard of the coordinated communication regulations.⁷ DNC Resp. at 5-
4 6. The DNC also contends that nothing in the "Charter or Bylaws of the DNC suggests the
5 existence of any such authority ...; no corporate resolution of the ... fiscal arm of the DNC ...
6 confers any such authority; and there are no facts set forth in the Complaint indicating the
7 existence of any such authority." DNC Resp. at 6 and Ex.G.

8 A finding that TMF engaged in coordinated communications depends, at this stage, on an
9 analysis of its activities under the "conduct" prong of the coordinated communication test, the
10 "payment" and "content" prongs having been met (and the DNC does not contest the elements
11 other than "conduct"). See GCR #2 at 12-13; DNC Resp. at 4-5. Here, an investigation of
12 whether TMF engaged in coordinated communications for the benefit of the DNC may be based
13 on the "material involvement" conduct standard. The "material involvement" standard is
14 satisfied if:

15 A candidate, an authorized committee, a political party committee, or an agent of any of
16 the foregoing, is materially involved in decisions regarding:

- 17 (i) The content of the communication;
18 (ii) The intended audience for the communication;
19 (iii) The means or mode of the communication;
20 (iv) The specific media outlet used for the communication;
21 (v) The timing or frequency of the communication; or
22 (vi) The size or prominence of a printed communication, or duration of a
23 communication by means of broadcast, cable or satellite.

⁶ The DNC also argues that the meetings of its Executive Committee are open to the public and are "routinely televised on C-SPAN." DNC Resp. at 5-6. It attached "full transcripts of meetings of the DNC Executive Committee during this election cycle." *Id.* at 6 and Exs. B-F.

⁷ The DNC addresses only two of the six conduct standards of the coordinated communication test. It concludes that, based on the alleged failure to demonstrate that Ickes was an agent of the DNC, neither the "material involvement" (Section 109.21(d)(2)) nor the "substantial discussion" (Section 109.21(d)(3)) conduct standard can be satisfied.

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11 C.F.R. § 109.21(d)(2).

Any potential coordinated communication by TMF for the benefit of the DNC is not dependent on a determination that Ickes is an “agent” of the DNC. Reading the “material involvement” prong to require the existence of an agency relationship between Ickes and the DNC—as the DNC argues—would lead to an absurd reading of the coordination regulation as a whole. It would mean that absent evidence that the DNC had authorized Ickes to act as its agent, there could be no finding of coordination against TMF, even if Ickes may have used material information he obtained from the DNC in the creation, production, or distribution of TMF’s ads. On the other hand, if Ickes had resigned his position with the DNC some time before TMF ran ads meeting the content standard then, under the “former employee” conduct standard, one could establish coordination merely by showing that Ickes had used information about the DNC’s plans, projects, or needs in connection with TMF’s ads. In other words, such a reading would make it *more difficult* to establish coordination based on circumstances where Ickes simultaneously held leadership positions at the DNC and TMF than it would be if Ickes had resigned his position with the DNC.

Such a conclusion defies common sense and is inconsistent with the Commission’s explanation of the “material involvement” prong of the regulation. The Commission described the “material involvement” standard as “necessary to address forms of ‘real world’ coordination that would not be addressed in any of the other conduct standards,” noting that the operation of this standard is “necessarily fact-based.” Explanation & Justification, “Coordinated and Independent Expenditures,” 68 Fed. R. 421, 433 (Jan. 3, 2003) (“E&J”). The potential use of inside information by a person who has leadership positions in both a spending organization and

1 a recipient committee is a type of "real world" coordination not directly addressed by any of the
2 other content standards.

3 Moreover, the Commission also explained that, in order to be "materially involved" in
4 decisions enumerated in Section 109.21(d)(2), the "representatives of [a] political party
5 committee need not be present or included during [the] formal decisionmaking process but need
6 only participate to the extent that he or she assists the ultimate decisionmaker, much like a
7 lawyer who provides legal advice to a client is materially involved in a client's decision even
8 when the client ultimately makes the decision." *Id.* at 434. It is also notable that the "material
9 involvement" standard describes conduct—in the disjunctive—by "[a] candidate, an authorized
10 committee, a political party committee, or an agent of any of the foregoing." *Id.* Accordingly,
11 apart from the activity through an authorized agent, a "political party committee" may be
12 materially involved in the activity by furnishing a decisionmaker for the spending organization
13 with access to party information that is material to the spending organization's advertising.⁸ In
14 the present matter, we believe that the DNC satisfied the "material involvement" standard
15 because of the conduct of one of its Executive Committee members—Ickes.

16 Ickes simultaneously held leadership positions in both the DNC and TMF. According to
17 the Charter of Democratic Party of the United States (as amended Jan. 19, 2002), the Executive
18 Committee of the DNC "shall be responsible for the conduct of the affairs of the Democratic
19 Party...." DNC Resp., Ex. G at 5. This role of the Executive Committee provides a basis to
20 infer that Ickes—as a member of the Executive Committee—had access to inside information

⁸ In its explanation of these rules, the Commission has repeated the disjunctive formulation of the persons at issue under the "material involvement" standard. "[A] candidate, authorized committee, or political party committee is considered 'materially involved' in the decisions enumerated in paragraph (d)(2) after sharing information about plans, projects, activities, or needs with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication." E&J at 434.

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1 and people who possessed such information. In other words, Ickes was in a position with the
2 DNC where he would likely have had access to material information about the DNC's plans,
3 projects, or needs, and was in a position with TMF to use that information to make decisions in
4 connection with TMF communications. During the relevant period, both TMF and the DNC
5 shared the goal of electing the Democratic nominee for President, and both engaged in extensive
6 ad campaigns. By focusing entirely on whether the DNC had authorized Ickes to act as its agent,
7 the DNC fails to refute a reasonable inference from these circumstances, which is that Ickes had
8 access to material information about the plans and needs of the DNC, and that he used such
9 information in determining the content, means, intended audience, specific media outlet, timing,
10 and other factors for communications made by TMF.

11 These circumstances at least warrant an investigation. Complainants will rarely, if ever,
12 be aware of anything more than circumstances facilitating coordination. We cannot know what
13 information Ickes may have had (and may have used) without an investigation.

14 In addition to the "material involvement" conduct standard, the facts present a basis to
15 investigate whether the "request or suggestion" or "substantial discussion" elements might also
16 be satisfied. *See* 11 C.F.R. § 109.21(d)(1) and (3). The "substantial discussion" conduct prong
17 (Section 109.21 (d)(3)) covers communications produced "after one or more substantial
18 discussions about the communication between the person paying for the communication [or that
19 person's employees or agents]" and any from a list of persons including a political party
20 committee or its agents. 11 C.F.R. § 109.21(d)(3). "A discussion is substantial within the
21 meaning of this paragraph if information about the [party committee's] campaign plans, projects,
22 activities or needs is conveyed to a person paying for the communication, and that information is
material to the creation, production, or distribution of the communication...." *Id.* As described

1 in our analysis of the "material involvement" standard, Ickes's leadership positions in both TMF
2 and the DNC creates an inference about his access to information at the DNC concerning that
3 party committee's "plans, projects, activities, or needs." The DNC's response does not foreclose
4 the basis for investigating whether any such discussions took place.

5 Even if an analysis of TMF's potential coordination with the DNC depended on a finding
6 that Ickes was an "agent" of the DNC, there is sufficient information to investigate whether he
7 acted in that role. As described in GCR #2, the available facts raise a question as to whether
8 Ickes in fact might have been acting as an agent of the DNC when he formed, and directed the
9 activities of, TMF. The DNC has not fully responded to this question. It merely asserts in a
10 conclusory fashion that Ickes was not the DNC's agent and argues only that nothing about his
11 position on the Executive Committee authorized him *ex officio* to act on the DNC's behalf with
12 respect to any third party. DNC Resp. at 5-6. The DNC did not, for example, provide sworn
13 statements, or even assert, that Ickes was not authorized by the DNC to act on its behalf at any
14 time. Accordingly, the threshold question of whether Ickes was in fact the DNC's agent is not
15 resolved, and an investigation will be necessary to resolve it.

16 The DNC contends that no provisions of the DNC's Charter or Bylaws, or other
17 resolutions, confer authority on Ickes—as an Executive Committee member—to be an "agent"
18 under the regulations. Such sources of authority, however, do not seem to offer an exhaustive
19 list of the means by which Ickes may be considered an "agent." Moreover, the fact that the
20 Executive Committee meetings were open to the public does not foreclose the possibility that, in

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1 a context other than those meetings, the DNC could have provided actual authority to Ickes to act
2 as an agent.⁹

3 This Office therefore recommends that the Commission find reason to believe that The
4 Media Fund violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive
5 contributions, in the form of coordinated expenditures, to the DNC¹⁰ and also that the
6 Commission find reason to believe that the DNC violated 2 U.S.C. §§ 441a(f) and 434 by
7 accepting, and failing to report, excessive in-kind contributions from The Media Fund.

8 **B. Bill Richardson**

9 Bill Richardson was elected "permanent Chair of the 2004 Democratic National
10 Convention...."¹¹ DNC Resp. at 6. He is alleged to be an officer or director of America Votes,
11 founder of Moving America Forward ("MAF"), an "advisor" to New Democrat Network
12 ("NDN"), and a Vice President of Voices for Working Families ("VWF"). Complaint at 23, 26-
13 27, 31-32, and 60.

14 The DNC argues that Richardson's role as Chair of his party's national convention meant
15 that he presided over the convention proceedings and that his duties were "solely parliamentary."
16 DNC Resp. at 6. The DNC also contends that nothing about Richardson's convention role would

⁹ While there is no legal requirement that respondents submit declarations from persons under their control who may have knowledge as to whether or not they acted to coordinate a particular communication, it is notable that the DNC did not attach such a document, which would have shed light on the scope of Ickes's activity with respect to the DNC. Moreover, the Commission has explained that the limitations found within the definition of "agent" are not "intended to establish any presumption against the creation of an agency relationship," and that an agency determination is "necessarily evaluated on a case-by-case basis." E&J at 425.

¹⁰ The Commission has already found reason to believe that The Media Fund violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to John Kerry for President, Inc. MUR 5403, et al. Certification (Sept. 29, 2004).

¹¹ Bill Richardson was elected Governor of New Mexico in 2002. He served as Ambassador to the United Nations in 1997, and as Secretary of the U.S. Department of Energy Secretary from 1998-2001. He previously served as a Congressman from New Mexico's Third Congressional District for 15 years. See www.governor.state.nm.us.

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1 “remotely give [him] the types of authority, described in section 109.3(a), that could make him
2 an ‘agent’ of the DNC for purposes of the coordination rules.” DNC Resp. at 6.

3 The activity of Richardson does not appear to establish coordinated communications
4 between his organizations and the DNC. The communications of three of these organizations
5 fail the “content” element of the coordinated communication test: we do not have evidence that
6 America Votes, MAF, or VWF engaged in “public communications.” See GCR #2 at 19-20
7 (America Votes), 21-22 (MAF), 23 (VWF). We therefore recommend that the Commission find
8 no reason to believe that America Votes, MAF, and VWF made coordinated expenditures for the
9 benefit of the DNC.

10 Although NDN has run television ads (see GCR #2 at 23-24), there is no information to
11 suggest that those ads satisfy any of the content standards of Section 109.21(c).¹² Furthermore,
12 neither the Complaint nor the available information provides any suggestion regarding
13 Richardson’s activity at NDN, against which any “conduct” standard might be measured.¹³
14 Finally, Richardson’s “parliamentary” role as Chair of the Democratic National Convention
15 appears to be insufficient to connect any activity (of which the Complaint is silent) between the
16 DNC and NDN that would satisfy any conduct standard of the coordinated communications test.

¹² NDN did not file any Electioneering Communication reports. See 11 C.F.R. § 109.21(c)(1). There is no allegation or information that NDN’s ads were republications of campaign materials. See 11 C.F.R. § 109.21(c)(2). NDN denies that any of its ads contained express advocacy, and our review of the available ads on NDN’s website does not indicate otherwise. See 11 C.F.R. § 109.21(c)(3) and NDN Resp. at 1. Finally, the Complaint provides no information regarding whether these ads were run within 120 days of relevant elections, and our review of NDN’s website does not provide such information. See 11 C.F.R. § 109.21(c)(4).

¹³ It appears that Richardson may have been a volunteer, and did not receive payment as an “employee” of the DNC, for his role as chair of his party’s convention. In such a case, he would qualify as a “volunteer,” and not a “former employee” under Section 109.21(d)(5). See E&J at 439.

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1 We therefore recommend that the Commission take no action at this time with respect to the
2 allegation that NDN made coordinated expenditures for the benefit of the DNC.¹⁴

3 There also does not appear to be a sufficient basis to investigate whether, through the
4 activity of Richardson, any of the four groups with which he is associated (America Votes, MAF,
5 NDN, and VWF) engaged in coordination with the DNC or John Kerry for President, under the
6 standard of Section 109.20 (*i.e.*, coordination other than "coordinated communications"). The
7 Complaint speaks generally of coordination, but it does not offer allegations that specific
8 activities of these groups violated Section 109.20. *See, e.g.*, Complaint at 4 ("This illegal soft
9 money conspiracy features ... illegally coordinated soft money voter mobilization activities.")
10 and 6 ("[T]he 527 organizations' coordination of advertising and voter mobilization activities
11 with John Kerry's campaign and the Democratic party is a violation of federal law.").

12 The mere assertion that MAF engaged in voter mobilization activities falls short of the
13 specificity required to find RTB that MAF coordinated with the DNC. A review of the
14 Complaint, the responses, filings with the IRS (or, in the case of MAF, with a state Secretary of
15 State) and news accounts produced little or no concrete information about what any of these
16 organizations did in connection with voter drives or other activity that may have been
17 coordinated with a party or candidate that could form the basis of an investigation under the
18 general coordination standard of Section 109.20.

19 **C. Linda Chavez-Thompson**

20 Linda Chavez-Thompson is currently a Vice Chair of the DNC. Complaint at 61. She is
21 also the Treasurer of Voices for Working Families. Resp. of VWF at 1.

¹⁴ If any information should arise in the investigation of NDN regarding its allocation decisions that might implicate Bill Richardson or the DNC, we will bring that to the Commission's attention.

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1 The DNC argues that the complaint does not allege that Chavez-Thompson satisfied the
2 "material involvement" (Section 109.21(d)(2)) or "substantial discussion" (Section 109.21(d)(3))
3 "conduct" standards. DNC Resp. 6. Furthermore, it contends that
4 as a rule, vice chairs of the DNC are not involved in the day-to-day operations of the
5 DNC and are not privy to any non-public information concerning the plans, projects,
6 strategies or needs of the DNC with respect to media, voter contact operations or any
7 other form of public communication.

8
9 DNC Resp. at 6-7. Moreover, the DNC argues that its vice chairs do not have "any authority ...
10 to do any of the things described" in the applicable definition of "agency." DNC Resp. at 7.

11 The alleged conduct of VWF does not appear to involve a coordinated communication.
12 As analyzed in GCR #2, the allegations fail to identify any communications that may satisfy the
13 "content" standard of the coordinated communication test. *See* GCR #2 at 22-23. The analysis
14 under Section 109.21 is disposed of on this basis and therefore we do not examine the conduct
15 prong here. Our review of the DNC Response does not change this conclusion. Neither does our
16 review of filings with the IRS and news service databases support a finding that VWF made
17 coordinated expenditures under Section 109.20.

18 **D. Minyon Moore**

19 Minyon Moore was Chief Operating Officer of the DNC during 2001 and 2002. DNC
20 Resp. at 7. The Complaint alleges that she currently serves on the executive committee of
21 America Coming Together ("ACT") and is a Kerry campaign consultant.¹⁵ *See* Complaint at 31,
22 59. The DNC argues that no unlawful coordination exists because the Complaint does not allege
23 that Moore "used or conveyed to ACT information about the DNC's plans, project[s], activities

¹⁵ As addressed in GCR #2, ACT denies that Moore either has been a consultant to, or has undertaken any other role in, the Kerry campaign. GCR #2 at 11; ACT Resp. at 15.

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1 or needs that was material to ACT's communications." DNC Resp. at 7 (citing 11 C.F.R. §
2 109.21(d)(5)).

3 Moore's activity might implicate the "former employee" "conduct standard." 11 C.F.R.
4 § 109.21.¹⁶ The DNC contends that the Complaint furnishes no evidence of such use or
5 conveyance of the DNC's "plans, project[s], activities or needs that was material to ACT's
6 communications." DNC Resp. at 7.

7 Although Moore held the position of chief operating officer at the DNC, she served
8 during 2001-2002, almost two years before the 2004 presidential election and a year before
9 Senator Kerry organized his presidential candidate committee. This information, without more,
10 does not suggest that Moore acquired information about the DNC's plans, projects, activities or
11 needs with regard to the Kerry campaign. It therefore does not seem reasonable to draw an
inference that she could have used or conveyed information that was "material" in the creation,
13 production, or distribution of ACT's communications with respect to the 2004 presidential
14 election, even though she may qualify as a "former employee."¹⁷ See 11 C.F.R.
15 § 109.21(d)(5)(ii).

16 This Office therefore recommends that the Commission take no action at this time with
17 respect to whether the DNC violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to
18 report, excessive in-kind contributions from ACT, or whether ACT violated 2 U.S.C. §§ 441a

¹⁶ The "content" standard is satisfied. See GCR #2 at 6. However, GCR #2 incorrectly dismissed the "former employee" conduct standard based on the assumption that her position with the DNC (from 2001-2002) occurred during a previous election cycle. See GCR #2 at 11. With respect to the presidential election of 2004, the relevant election cycle began on the day after the presidential election of 2000. See 11 C.F.R. § 100.3(b).

¹⁷ If any information should arise in the investigation of ACT that might implicate Minyon Moore with respect to the conduct prong of the coordinated communications test, we will bring that to the Commission's attention.

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1 and 434 by making, and failing to report, excessive contributions, in the form of coordinated
2 expenditures, to the DNC.

3 **IV. ANALYSIS OF JOHN KERRY FOR PRESIDENT**

4 This Office does not recommend proceeding against Kerry for President at this time.

5 Although we considered a certain analysis in GCR #2 as the basis to investigate the Kerry
6 campaign, upon further reflection, we do not believe that it is sufficient to support an RTB
7 finding. See GCR #2 at 18. The regulations provide that coordinated communications based on
8 "former employee" (or "common vendor") conduct would not constitute in-kind contributions
9 received by the candidate, unless the candidate engaged in conduct described in Sections
10 109.21(d)(1) through (d)(3). See 11 C.F.R. § 109.21(b)(2). Although we do not have sufficient
11 information at this time, an investigation into allegations that TMF made coordinated
12 expenditures utilizing information obtained from Jim Jordan, a former employee of the Kerry
13 campaign,¹⁸ may uncover information indicating that Kerry for President engaged in conduct
14 described in Sections 109.21(d)(1) through (d)(3) that will allow us to make appropriate
15 recommendations at a later date.

16 Further, although we believe that there is reason to believe that TMF engaged in
17 coordinated communications with the DNC based on conduct other than that of a "common
18 vendor" or "former employee," we believe that it would be appropriate for the Commission to
19 defer findings as to Kerry for President until further information is developed. This
20 recommendation supersedes our prior recommendation (number 4) in GCR #2 that the
21 Commission find reason to believe that Kerry accepted excessive in-kind contributions in the
22 form of coordinated communications.

¹⁸ Jim Jordan's conduct is discussed in GCR #2 (at 7-9 and 14-15).

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V. PROPOSED ACTION

VI. RECOMMENDATIONS

1. Find reason to believe that The Media Fund violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer

2. Find reason to believe that the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to report, excessive in-kind contributions from The Media Fund.

3. Take no action at this time with respect to whether the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to report, excessive in-kind contributions from America Coming Together, or whether America Coming Together violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer.

4. Take no action at this time with respect to whether the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to report, excessive in-kind contributions from the New Democrat Network, or whether the New Democrat Network violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer.

5. Take no action at this time with regard to John Kerry for President Inc. and Robert Farmer, as Treasurer.

6. Find no reason to believe that America Votes, Moving America Forward, and Voices for Working Families violated 2 U.S.C. § 441a(f) by making excessive in-kind contributions, in the form of coordinated expenditures, to John Kerry for President, Inc. or the DNC Services Corporation/Democratic National Committee.

7. Approve the appropriate factual and legal analyses.

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8. Approve the appropriate letters.

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12/7/09
Date

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